

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

JAMES NALDER, Guardian Ad Litem ) 2:09-cv-1348-ECR-GWF  
for minor Cheyanne Nalder, real )  
party in interest, and GARY LEWIS, )  
Individually; )

Plaintiffs, )

Order

vs. )

UNITED AUTOMOBILE INSURANCE )  
COMPANY, DOES I through V, and )  
ROE CORPORATIONS I through V, )  
inclusive )

Defendants. )

Plaintiffs in this automobile insurance case allege breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, breach of Nev. Rev. Stat. § 686A.310, and fraud. Now pending is Defendant's "motion for summary judgment on all claims; alternatively, motion for summary judgment on extra-contractual remedies; or, further in the alternative, motion stay [sic] discovery and bifurcate claims for extra-contractual remedies; finally, in the alternative, motion for leave to amend" ("MSJ") (#17).

The motion is ripe, and we now rule on it.

**I. Background**

1  
2 Plaintiff Gary Lewis ("Lewis") is a resident of Clark County,  
3 Nevada. (Compl. ¶ 2 (#1).) Plaintiff James Nalder ("Nalder"),  
4 Guardian ad Litem for minor Cheyanne Nalder, is a resident of Clark  
5 County, Nevada. (Id. at ¶ 1.) Defendant United Automobile  
6 Insurance Co. ("UAIC") is an automobile insurance company duly  
7 authorized to act as an insurer to the State of Nevada and doing  
8 business in Clark County, Nevada. (Id. at ¶ 3.) Defendant is  
9 incorporated in the State of Florida with its principal place of  
10 business in the State of Florida. (Pet. for Removal ¶ VII (#1).)

11 Lewis was the owner of a 1996 Chevy Silverado insured, at  
12 various times, by Defendant. (Compl. at ¶ 5-6 (#1).) Lewis had an  
13 insurance policy issued by UAIC on his vehicle during the period of  
14 May 31, 2007 to June 30, 2007. (MSJ at 3 (#17).) Lewis received a  
15 renewal statement, dated June 11, 2007, instructing him to remit  
16 payment by the due date of June 30, 2007 in order to renew his  
17 insurance policy. (Id. at 3-4.) The renewal statement specified  
18 that "[t]o avoid lapse in coverage, payment must be received prior  
19 to expiration of your policy." (Pls.' Opp. at 3 (#20).) The  
20 renewal statement listed June 30, 2007 as effective date, and July  
21 31, 2007 as an "expiration date." (Id.) The renewal statement also  
22 states that the "due date" of the payment is June 30, 2007, and  
23 repeats that the renewal amount is due no later than June 30, 2007.  
24 (MSJ at 7-8 (#17).) Lewis made a payment on July 10, 2007. (Id.)

25 Defendant then issued a renewal policy declaration and  
26 automobile insurance cards indicating that Lewis was covered under  
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1 an insurance policy between July 10, 2007 to August 10, 2007. (Pls'  
2 Opp. Exhibit 1 at 35-36; MSJ at 4.)

3 On July 8, 2007, Lewis was involved in an automobile accident  
4 in Pioche<sup>1</sup>, Nevada, that injured Cheyanne Nalder. (MSJ at 3 (#17).)  
5 Cheyanne Nalder made a claim to Defendant for damages under the  
6 terms of Lewis's insurance policy with UAIC. (Compl. at ¶ 9 (#1).)  
7 Defendant refused coverage for the accident that occurred on July 8,  
8 2007, claiming that Lewis did not have coverage at the time of the  
9 accident. (Id. at ¶ 10.) On October 9, 2007, Plaintiff Nalder, as  
10 guardian of Cheyanne Nalder, filed suit in Clark County District  
11 Court under suit number A549111 against Lewis. (Mot. to Compel at 3  
12 (#12).) On June 2, 2008, the court in that case entered a default  
13 judgment against Lewis for \$3.5 million. (Id.)

14 Plaintiffs then filed their complaint in this action in Nevada  
15 state court on March 22, 2009 against Defendant UAIC. On July 24,  
16 2009, Defendant removed the action to federal court, invoking our  
17 diversity jurisdiction. (Petition for Removal (#1).)

18 On March 18, 2010, Defendant filed the MSJ (#17). On April 9,  
19 2010, Plaintiffs opposed (#20), and on April 26, 2010, Defendant  
20 replied (#21). We granted leave for Plaintiffs to file a supplement  
21 (#26), and Defendant filed a supplement (#33) to its reply (#21).

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25 <sup>1</sup> Plaintiffs' complaint originally alleged that the accident  
26 occurred in Clark County, Nevada. It is unclear from the documents  
27 which site is the correct one, but neither party disputes jurisdiction  
and the actual location of the accident is irrelevant to the  
disposition of this motion.

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## II. Summary Judgment Standard

Summary judgment allows courts to avoid unnecessary trials where no material factual dispute exists. N.W. Motorcycle Ass'n v. U.S. Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). The court must view the evidence and the inferences arising therefrom in the light most favorable to the nonmoving party, Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996), and should award summary judgment where no genuine issues of material fact remain in dispute and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party. FED. R. CIV. P. 50(a). Where reasonable minds could differ on the material facts at issue, however, summary judgment should not be granted. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 116 S.Ct. 1261 (1996).

The moving party bears the burden of informing the court of the basis for its motion, together with evidence demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the party opposing the motion may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing that there exists a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the parties may submit evidence in an inadmissible form – namely, depositions, admissions, interrogatory answers, and affidavits – only evidence which might be admissible at trial may be considered

1 by a trial court in ruling on a motion for summary judgment. FED.  
2 R. Civ. P. 56(c); Beyene v. Coleman Sec. Servs., Inc., 854 F.2d  
3 1179, 1181 (9th Cir. 1988).

4 In deciding whether to grant summary judgment, a court must  
5 take three necessary steps: (1) it must determine whether a fact is  
6 material; (2) it must determine whether there exists a genuine issue  
7 for the trier of fact, as determined by the documents submitted to  
8 the court; and (3) it must consider that evidence in light of the  
9 appropriate standard of proof. Anderson, 477 U.S. at 248. Summary  
10 judgment is not proper if material factual issues exist for trial.  
11 B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir.  
12 1999). "As to materiality, only disputes over facts that might  
13 affect the outcome of the suit under the governing law will properly  
14 preclude the entry of summary judgment." Anderson, 477 U.S. at 248.  
15 Disputes over irrelevant or unnecessary facts should not be  
16 considered. Id. Where there is a complete failure of proof on an  
17 essential element of the nonmoving party's case, all other facts  
18 become immaterial, and the moving party is entitled to judgment as a  
19 matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a  
20 disfavored procedural shortcut, but rather an integral part of the  
21 federal rules as a whole. Id.

### 22 III. Analysis

23  
24 Defendant seeks summary judgment on all claims on the basis  
25 that Lewis had no insurance coverage on the date of the accident.  
26 Plaintiff contends that Lewis was covered on the date of the  
27 accident because the renewal notice was ambiguous as to when payment  
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1 must be received in order to avoid a lapse in coverage, and any  
2 ambiguities must be construed in favor of the insured. Defendants  
3 request, in the alternative, that we dismiss Plaintiffs' extra-  
4 contractual claims, or bifurcate the claim of breach of contract  
5 from the remaining claims. Finally, if we deny all other requests,  
6 Defendant requests that we grant leave to amend

7 A. Contract Interpretation Standard

8 In diversity actions, federal courts apply substantive state  
9 law. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); Nitco  
10 Holding Corp. v. Boujikian, 491 F.3d 1086, 1089 (9th Cir. 2007).  
11 Under Nevada law, "[a]n insurance policy is a contract that must be  
12 enforced according to its terms to accomplish the intent of the  
13 parties." Farmers Ins. Exch. v. Neal, 64 P.3d 472, 473 (Nev. 2003).  
14 When the facts are not in dispute, contract interpretation is a  
15 question of law. Grand Hotel Gift Shop v. Granite State Ins. Co.,  
16 839 P.2d 599, 602 (Nev. 1992). The language of the insurance policy  
17 must be viewed "from the perspective of one not trained in law," and  
18 we must "give plain and ordinary meaning to the terms." Farmers  
19 Ins. Exch., 64 P.3d at 473 (internal quotation marks omitted).  
20 "Unambiguous provisions will not be rewritten; however, ambiguities  
21 are to be resolved in favor of the insured." Id. (footnote  
22 omitted); see also Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co., 184  
23 P.3d 390, 392 (Nev. 2008) ("In the insurance context, we broadly  
24 interpret clauses providing coverage, to afford the insured the  
25 greatest possible coverage; correspondingly, clauses excluding  
26 coverage are interpreted narrowly against the insurer.") (internal  
27 quotation marks omitted); Capitol Indemnity Corp. v. Wright, 341 F.

1 Supp. 2d 1152, 1156 (D. Nev. 2004) (noting that "a Nevada court will  
2 not increase an obligation to the insured where such was  
3 intentionally and unambiguously limited by the parties"). "When a  
4 contract is unambiguous and neither party is entitled to relief from  
5 the contract, summary judgment based on the contractual language is  
6 proper." Allstate Ins. Co. v. Fackett, 206 P.3d 572, 575 (Nev.  
7 2009) (citing Chwialkowski v. Sachs, 834 P.2d 405, 406 (Nev. 1992)).

8 B. Plaintiff Lewis' Insurance Coverage on July 8, 2007

9 Plaintiffs contend that Lewis was covered under an insurance  
10 policy on July 8, 2007, the date of the accident, because Lewis'  
11 payment on July 10, 2007 was timely. Plaintiffs rely on the  
12 sentence "[t]o avoid lapse in coverage, payment must be received  
13 prior to expiration of your policy" contained in the renewal  
14 statement. Defendant contends that "expiration of your policy" did  
15 not refer to the expiration date of the renewal policy listed on the  
16 renewal statement, but to the expiration of Lewis' current policy,  
17 which coincided with the listed due date on the renewal statement.  
18 Plaintiffs contend that Lewis reasonably believed that while there  
19 was a due date on which UAIC preferred to receive payment, there was  
20 also a grace period within which Lewis could pay and avoid any lapse  
21 in coverage.

22 The renewal statement cannot be considered without considering  
23 the entirety of the contract between Lewis and UAIC. Plaintiff  
24 attached exhibits of renewal statements, policy declarations pages,  
25 and Nevada automobile insurance cards issued by UAIC for Lewis. The  
26 contract, taken as a whole, cannot reasonably be interpreted in  
27 favor of Plaintiffs' argument.

1 Lewis received a "Renewal Policy Declarations" stating that he  
2 had coverage from May 31, 2007 to June 30, 2007 at 12:01 A.M. (Pls'  
3 Opp., Exhibit A at 29 (#20-1); Pls' Supp., Exhibit A at 11-12 (#26-  
4 1); Pls' Supp., Exhibit A at 15 (#26-1).) The declarations page  
5 stated that "[t]his declaration page with 'policy provisions' and  
6 all other applicable endorsements complete your policy." (Pls'  
7 Opp., Exhibit A at 29 (#20-1).) Lewis also received a Nevada  
8 Automobile Insurance Card issued by UAIC stating that the effective  
9 date of his policy was May 31, 2007, and the expiration date was  
10 June 30, 2007. (Id. at 30; Pls' Supp., Exhibit A at 11-12 (#26-1).)  
11 The renewal statement Lewis received in June must be read in light  
12 of the rest of the insurance policy, contained in the declarations  
13 page and also summarized in the insurance card.

14 "In interpreting a contract, 'the court shall effectuate the  
15 intent of the parties, which may be determined in light of the  
16 surrounding circumstances if not clear from the contract itself.'"  
17 Anvui, LLC v. G.L. Dragon, LLC, 163 P.3d 405, 407 (Nev. 2007).  
18 Plaintiffs contend that there was a course of dealing between Lewis  
19 and UAIC supporting a reasonable understanding that there was a  
20 grace period involved in paying the insurance premium for each  
21 month-long policy. In fact, the so-called course of dealing tilts,  
22 if at all, in favor of Defendant. Lewis habitually made payments  
23 that were late. UAIC never retroactively covered Lewis on such  
24 occasions. Lewis' new policy, clearly denoted on the declarations  
25 page and insurance cards Lewis was issued, would always become  
26 effective on the date of the payment.



1 Plaintiffs point to the fact that in April 2007, Lewis was  
2 issued a revised renewal statement stating that the renewal amount  
3 was due on May 6, 2007, a date after the effective date of the  
4 policy Lewis would be renewing through the renewal amount. This  
5 isolated occasion occurred due to the fact that Lewis added a driver  
6 to his insurance policy, resulting in an increase in the renewal  
7 amount, after UAIC had previously sent a renewal notice indicating  
8 that a lower renewal amount was due on April 29, 2007. UAIC issued  
9 a revised renewal statement dated April 26, 2007, and gave Lewis an  
10 opportunity to pay by May 6, 2007, instead of April 29, 2007, when  
11 the original renewal amount had been due upon expiration of his  
12 April policy. In that case, Lewis made a timely payment on April  
13 28, 2007, and therefore there is not a single incident Plaintiffs  
14 can point to in which Lewis was retroactively covered for a policy  
15 before payment was made, even in the single instance UAIC granted  
16 him such an opportunity due to a unique set of circumstances.

17 C. Statutory Arguments

18 Plaintiffs' arguments that Lewis had coverage due to Nev. Rev.  
19 Stat. § 687B.320 and § 687B.340 are untenable. Section 687B.320  
20 applies in the case of midterm cancellations, providing that:

21 1. Except as otherwise provided in subsection 3, no  
22 insurance policy that has been in effect for at least 70  
23 days or that has been renewed may be cancelled by the  
24 insurer before the expiration of the agreed term or 1 year  
25 from the effective date of the policy or renewal,  
26 whichever occurs first, except on any one of the following  
27 grounds:

1 (a) Failure to pay a premium when due;

2 . . .

3 2. No cancellation under subsection 1 is effective until  
4 in the case of paragraph (a) of subsection 1 at least 10  
5 days and in the case of any other paragraph of subsection  
6 1 at least 30 days after the notice is delivered or mailed  
7 to the policyholder.

8 The policies at issue in this case were month-long policies  
9 with options to renew after the expiration of each policy. Lewis'  
10 June policy expired on June 30, 2007, according to its terms. There  
11 was no midterm cancellation and Nev. Rev. Stat. § 687B.320 simply  
12 does not apply. Plaintiffs' arguments that between terms is  
13 equivalent to "midterm" simply defies the statutory language and the  
14 common definition of midterm. In a Ninth Circuit case interpreting  
15 Montana law, the Ninth Circuit noted that the district court's  
16 observation that "the policy expired by its own terms; it was not  
17 cancelled" was proper, and the Montana statute at issue in the case,  
18 similar to the Nevada statute here, "appl[ies] only to cancellation  
19 of a policy, not to its termination." State Farm Mut. Auto. Ins.  
20 Co. v. White, 563 F.2d 971, 974 (9th Cir. 1977). The Ninth Circuit  
21 went on to note that situations in which "the policy terminated by  
22 its own terms for failure of the insured to renew" is controlled by  
23 a different statute, which "does not require any notice to the  
24 policy-holder when the reason for the non-renewal of the policy is  
25 the holder's failure to pay the renewal premiums." Id.

26 Nev. Rev. Stat. § 687B.340 provides:  
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1           1. Subject to subsection 2, a policyholder has a right to  
2           have his or her policy renewed, on the terms then being  
3           applied by the insurer to persons, similarly situated, for  
4           an additional period equivalent to the expiring term if the  
5           agreed term is 1 year or less, or for 1 year if the agreed  
6           term is longer than 1 year, unless:

7           . . .

8           (b) At least 30 days for all other policies,  
9           before the date of expiration provided in the policy the  
10          insurer mails or delivers to the policyholder a notice of  
11          intention not to renew the policy beyond the agreed  
12          expiration date. If an insurer fails to provide a timely  
13          notice of nonrenewal, the insurer shall provide the insured  
14          with a policy of insurance on the identical terms as in the  
15          expiring policy.

16          Plaintiffs argues that Nev. Rev. Stat. § 687B.340 indicates how  
17          favorable the law is to the insured, and that there is no mention in  
18          the statute that payment is a prerequisite to a policyholder's  
19          "right to have his or her policy renewed." It is true that the  
20          Nevada statute does not include a provision similar to the one in  
21          the Montana statute providing that the section does not apply when  
22          the insured has "failed to discharge when due any of his obligations  
23          in connection with the payment of premiums for the policy, or the  
24          renewal therefor . . . ." White, 563 F.2d at 974 n.3. The Montana  
25          statute also stated that the section does not apply "[i]f the  
26          insurer has manifested its willingness to renew." Id.

1 Plaintiffs, however, fail to give credit to the entirety of the  
2 Nevada statute. The statute does not say that the policyholder's  
3 policy must be renewed, it says that the insurer shall provide the  
4 insured with a policy on "the identical terms as in the expiring  
5 policy." One of the terms of the expiring policy was payment of the  
6 renewal amount. UAIC did provide Lewis, the policyholder, with a  
7 renewal statement indicating that UAIC would renew the insurance  
8 policy as long as all the terms of the previous policy were met,  
9 i.e., payment.

10 Defendant correctly points out that this statute does not fit  
11 the circumstances of this case. Lewis' policy was not renewed not  
12 because UAIC had an intention not to renew, but because Lewis failed  
13 to carry out his end of the contract, that is, to pay a renewal  
14 amount. Lewis' policy was renewed on the date payment was received,  
15 but this date was after the date of the accident. Plaintiffs'  
16 statutory arguments, therefore, do not pass muster.

17

#### 18 **IV. Conclusion**

19 Defendant's motion for summary judgment on all claims shall be  
20 granted because Lewis had no insurance coverage on the date of the  
21 accident. The renewal statement was not ambiguous in light of the  
22 entire contract and history between Lewis and UAIC. The term  
23 "expiration of your policy" referred to the expiration of Lewis'  
24 current policy, and Lewis was never issued retroactive coverage when  
25 his payments were late. His renewal policy would always begin on  
26 the date payment was received. We cannot find that Lewis was  
27 covered between the expiration of his policy in June and payment for

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1 his next policy without straining to find an ambiguity where none  
2 exists, and creating an obligation on the part of insurance  
3 companies that would be untenable, i.e., to provide coverage when  
4 the insured has not upheld his own obligations under the contract to  
5 submit a payment.

6 The statutes cited by Plaintiffs simply do not apply. The  
7 expiration of Lewis' policy was not a midterm cancellation, and UAIC  
8 was not obligated to provide an insurance policy despite Lewis'  
9 failure to adhere to the terms of that policy.

10 Defendant's other requests are moot in light of our decision  
11 granting summary judgment.

12  
13 **IT IS, THEREFORE, HEREBY ORDERED** that Defendant's motion for  
14 summary judgment on all claims (#17) is **GRANTED** with respect to all  
15 of Plaintiffs' claims.

16 The Clerk shall enter judgment accordingly.

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18  
19 DATED: December 17, 2010.

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21 UNITED STATES DISTRICT JUDGE